

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Parts 1, 6, 7, 14, 20, 64, and 68****[EB Docket No. 17–245; FCC 18–96]****Formal Complaint Proceedings to the Enforcement Bureau****AGENCY:** Federal Communications Commission.**ACTION:** Final rule.

**SUMMARY:** In this document, the Federal Communications Commission (Commission) considers creating a uniform set of procedural rules for formal complaint proceedings delegated to the Enforcement Bureau and currently handled by its Market Disputes Resolution Division and Telecommunications Consumers Division. This document streamlines and consolidates the procedural rules governing formal complaints filed under section 208 of the Communications Act of 1934, as amended (Act); pole attachment complaints filed under section 224 of the Act; and formal advanced communications services and equipment complaints filed under sections 255, 716, and 718 of the Act.

**DATES:** Effective October 4, 2018.

**FOR FURTHER INFORMATION CONTACT:** Michael Engel, Federal Communications Commission Enforcement Bureau, Market Disputes Resolution Division, at (202) 418–7330.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Report and Order in EB Docket No. 17–245, FCC 18–96 adopted July 12, 2018 and released July 18, 2018. The full text of this document is available for public inspection during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW, Room CY–A257, Washington, DC 20554. It also is available on the Commission's website at [https://apps.fcc.gov/edocs\\_public/](https://apps.fcc.gov/edocs_public/). On September 13, 2017, the Commission adopted a Notice of Proposed Rulemaking (NPRM) proposing and seeking comment on revisions to formal complaint procedures. The NPRM was published in the *Federal Register* on September 26, 2017 (82 FR 44755). Specifically, the NPRM proposed to streamline and consolidate the procedural rules governing formal complaints filed under Section 208 of the Act; pole attachment complaints filed under Section 224 of the Act; and formal advanced communications services and equipment complaints filed under Sections 255, 716, and 718 of the Act.

**Paperwork Reduction Act**

This document contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. In this present document, we have assessed the effects of this rule and find that any burden on small businesses will be minimal because the rules streamline the formal complaint process and reduce burdens on all parties.

**Congressional Review Act**

The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

**List of Subjects in 47 CFR Parts 1, 6, 7, 14, 20, 64, and 68**

Common carriers, Communications, Telecommunications, Telephone.

Federal Communications Commission

**Marlene Dortch,**  
*Secretary.*

**Final Rules**

For the reasons discussed in this preamble, the Federal Communications Commission amends 47 CFR parts 1, 6, 7, 14, 20, 64, and 68 as follows:

**PART 1—PRACTICE AND PROCEDURE**

- 1. The authority citation for part 1 continues to read as follows:

**Authority:** 47 U.S.C. 151, 154(i), 155, 157, 160, 201, 225, 227, 303, 309, 332, 1403, 1404, 1451, 1452, and 1455, unless otherwise noted.

- 2. Amend § 1.47 by revising paragraph (d) to read as follows:

**§ 1.47 Service of documents and proof of service.**

\* \* \* \* \*

(d) Except in formal complaint proceedings against common carriers

under §§ 1.720 through 1.740 of this chapter, documents may be served upon a party, his attorney, or other duly constituted agent by delivering a copy or by mailing a copy to the last known address. Documents that are required to be served must be served in paper form, even if documents are filed in electronic form with the Commission, unless the party to be served agrees to accept service in some other form.

\* \* \* \* \*

- 3. Amend § 1.49 by revising paragraph (f)(1)(i) to read as follows:

**§ 1.49 Specifications as to pleadings and documents.**

\* \* \* \* \*

(f) \* \* \*

(1) \* \* \*

(i) Formal complaint proceedings under section 208 of the Act and rules in §§ 1.720 through 1.740, and pole attachment complaint proceedings under section 224 of the Act and rules in §§ 1.1401 through 1.1415;

\* \* \* \* \*

- 4. Revise § 1.717 to read as follows:

**§ 1.717 Procedure.**

The Commission will forward informal complaints to the appropriate carrier for investigation and may set a due date for the carrier to provide a written response to the informal complaint to the Commission, with a copy to the complainant. The response will advise the Commission of the carrier's satisfaction of the complaint or of its refusal or inability to do so. Where there are clear indications from the carrier's response or from other communications with the parties that the complaint has been satisfied, the Commission may, in its discretion, consider a complaint proceeding to be closed. In all other cases, the Commission will notify the complainant that if the complainant is not satisfied by the carrier's response, or if the carrier has failed to submit a response by the due date, the complainant may file a formal complaint in accordance with § 1.721.

- 5. Revise § 1.718 to read as follows:

**§ 1.718 Unsatisfied informal complaints; formal complaints relating back to the filing dates of informal complaints.**

When an informal complaint has not been satisfied pursuant to § 1.717, the complainant may file a formal complaint with this Commission in the form specified in § 1.721. Such filing will be deemed to relate back to the filing date of the informal complaint: *Provided*, That the formal complaint: Is filed within 6 months from the date of the carrier's response, or if no response

has been filed, within 6 months of the due date for the response; makes reference to the date of the informal complaint, and is based on the same cause of action as the informal complaint. If no formal complaint is filed within the 6-month period, the informal complaint proceeding will be closed.

■ 6. Amend the table of contents of part 1 by revising the section headings of §§ 1.720 through 1.736, and adding section headings for §§ 1.737 through 1.740, to read as follows:

* * * * *	
Sec.	
1.720	Purpose.
1.721	General pleading requirements.
1.722	Format and content of complaints.
1.723	Damages.
1.724	Complaints governed by section 208(b)(1) of the Act.
1.725	Joinder of complainants and causes of action.
1.726	Answers.
1.727	Cross-complaints and counterclaims.
1.728	Replies.
1.729	Motions.
1.730	Discovery.
1.731	Confidentiality of information produced or exchanged.
1.732	Other required written submissions.
1.733	Status conference.
1.734	Fee remittance; electronic filing; copies; service; separate filings against multiple defendants.
1.735	Conduct of proceedings.
1.736	Accelerated Docket Proceedings.
1.737	Mediation.
1.738	Complaints filed pursuant to 47 U.S.C. 271(d)(6)(B).
1.739	Primary jurisdiction referrals.
1.740	Review period for section 208 formal complaints not governed by section 208(b)(1) of the Act.

\* \* \* \* \*

■ 7. Revise §§ 1.720 through 1.736 to read as follows:

**§ 1.720 Purpose.**

The following procedural rules apply to formal complaint proceedings under 47 U.S.C. 208, pole attachment complaint proceedings under 47 U.S.C. 224, and advanced communications services and equipment formal complaint proceedings under 47 U.S.C. 255, 617, and 619, and part 14 of this chapter. Additional rules relevant only to pole attachment complaint proceedings are provided in subpart J of this part.

**§ 1.721 General pleading requirements.**

Formal complaint proceedings are generally resolved on a written record consisting of a complaint, answer, reply, and joint statement of stipulated facts, disputed facts and key legal issues, along with all associated evidence in the record. The Commission may also

require or permit other written submissions such as briefs, proposed findings of fact and conclusions of law, or other supplementary documents or pleadings.

(a) All papers filed in any proceeding subject to this part must be drawn in conformity with the requirements of §§ 1.49, 1.50, and 1.52.

(b) Pleadings must be clear, concise, and direct. All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity.

(c) Pleadings must contain facts which, if true, are sufficient to constitute a violation of the Act or a Commission regulation or order, or a defense to an alleged violation.

(d) Averred facts, claims, or defenses shall be made in numbered paragraphs and must be supported by relevant evidence. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth. Assertions based on information and belief are prohibited unless made in good faith and accompanied by a declaration or affidavit explaining the basis for the party's belief and why the party could not reasonably ascertain the facts from any other source.

(e) Legal arguments must be supported by appropriate statutory, judicial, or administrative authority.

(f) Opposing authorities must be distinguished.

(g) Copies must be provided of all non-Commission authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies. In addition, copies of state authorities relied upon shall be provided.

(h) Parties are responsible for the continuing accuracy and completeness of all information and supporting authority furnished in a pending complaint proceeding. Information submitted, as well as relevant legal authorities, must be current and updated as necessary and in a timely manner before a decision is rendered on the merits of the complaint.

(i) Specific reference shall be made to any tariff or contract provision relied on in support of a claim or defense. Copies of relevant tariffs, contracts, or relevant portions that are referred to or relied upon in a complaint, answer, or other pleading shall be appended to such pleading.

(j) Pleadings shall identify the name, address, telephone number, and email address for either the filing party's attorney or, where a party is not represented by an attorney, the filing party. Pleadings may be signed by a party's attorney.

(k) All attachments shall be Bates-stamped or otherwise numbered sequentially. Parties shall cite to Bates-stamped page numbers in their pleadings.

(l) Pleadings shall be served on all parties to the proceeding in accordance with § 1.734 and shall include a certificate of service.

(m) Each pleading or other submission must contain a written verification that the signatory has read the submission and, to the best of his or her knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of the proceeding. If any pleading or other submission is signed in violation of this provision, the Commission may upon motion or upon its own initiative impose appropriate sanctions.

(n) Parties may petition the staff, pursuant to § 1.3, for a waiver of any of the rules governing formal complaints. Such waiver may be granted for good cause shown.

(o) A complaint may, on request of the filing party, be dismissed without prejudice as a matter of right prior to the adoption date of any final action taken by the Commission with respect to the complaint. A request for the return of an initiating document will be regarded as a request for dismissal.

(p) Amendments or supplements to complaints to add new claims or requests for relief are prohibited.

(q) Failure to prosecute a complaint will be cause for dismissal.

(r) Any document purporting to be a formal complaint which does not state a cause of action under the Communications Act, or a Commission regulation or order, will be dismissed. In such case, any amendment or supplement to such document will be considered a new filing which must be made within any applicable statutory limitations of actions.

(s) Any other pleading that does not conform with the requirements of the applicable rules may be deemed defective. In such case the Commission may strike the pleading or request that specified defects be corrected and that

proper pleadings be filed with the Commission and served on all parties within a prescribed time as a condition to being made a part of the record in the proceeding.

(t) Pleadings shall be construed so as to do justice.

(u) Any party that fails to respond to official correspondence, a request for additional information, or an order or directive from the Commission may be subject to appropriate sanctions.

#### **§ 1.722 Format and content of complaints.**

A formal complaint shall contain:

(a) The name of each complainant and defendant;

(b) The occupation, address and telephone number of each complainant and, to the extent known, each defendant;

(c) The name, address, telephone number, and email address of complainant's attorney, if represented by counsel;

(d) Citation to the section of the Communications Act or Commission regulation or order alleged to have been violated; each such alleged violation shall be stated in a separate count;

(e) Legal analysis relevant to the claims and arguments set forth therein;

(f) The relief sought, including recovery of damages and the amount of damages claimed, if known;

(g) Certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement with each defendant prior to the filing of the formal complaint. In disputes between businesses, associations, or other organizations, the certification shall include a statement that the complainant has engaged or attempted to engage in executive-level discussions concerning the possibility of settlement. Executive-level discussions are discussions among representatives of the parties who have sufficient authority to make binding decisions on behalf of the entity they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant notified each defendant in writing of the allegations that form the basis of the complaint and invited a response within a reasonable period of time. A refusal by a defendant to engage in discussions contemplated by this rule may constitute an unreasonable practice under the Act. The certification shall also include a brief summary of all additional steps taken to resolve the dispute prior to the filing of the formal complaint;

(h) A statement explaining whether a separate action has been filed with the

Commission, any court, or other government agency that is based on the same claim or same set of facts, in whole or in part, or whether the complaint seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment rulemaking proceeding that is concurrently before the Commission;

(i) An information designation containing:

(1) The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding, along with the subjects of that information, excluding individuals otherwise identified in the complaint or exhibits thereto, and individuals employed by another party; and

(2) A copy—or a description by category and location—of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, excluding documents submitted with the complaint.

(j) A completed Formal Complaint Intake Form;

(k) A declaration, under penalty of perjury, by the complainant or complainant's counsel describing the amount, method, and date of the complainant's payment of the filing fee required under § 1.1106 and the complainant's 10-digit FCC Registration Number, as required by subpart W of this part. Submission of a complaint without the FCC Registration Number will result in dismissal of the complaint.

#### **§ 1.723 Damages.**

(a) If a complainant in a formal complaint proceeding wishes to recover damages, the complaint must contain a clear and unequivocal request for damages.

(b) In all cases in which recovery of damages is sought, the complaint must include either:

(1) A computation of each and every category of damages for which recovery is sought, along with an identification of all relevant documents and materials or such other evidence to be used by the complainant to prove the amount of such damages; or

(2) If any information not in the possession of the complainant is necessary to develop a detailed computation of damages, an explanation of:

(i) Why such information is unavailable to the complaining party;

(ii) The factual basis the complainant has for believing that such evidence of damages exists; and

(iii) A detailed outline of the methodology that would be used to create a computation of damages with such evidence.

(c) If a complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the complainant must:

(1) Comply with paragraph (a) of this section, and

(2) State clearly and unequivocally that the complainant wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief will be made.

(d) If the Commission decides that a determination of damages would best be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made, the Commission may at any time bifurcate the case and order that the initial proceeding will determine only liability and prospective relief, and that a separate, subsequent proceeding initiated in accordance with paragraph (e) of this section will determine damages.

(e) If a complainant exercises its right under paragraph (c) of this section, or the Commission invokes its authority under paragraph (d) of this section, the complainant may initiate a separate proceeding to obtain a determination of damages by filing a supplemental complaint within sixty days after public notice (as defined in § 1.4(b)) of a decision that contains a finding of liability on the merits of the original complaint. Supplemental complaints filed pursuant to this section need not comply with the requirements in §§ 1.721(c) or 1.722(d), (g), (h), (j), and (k). The supplemental complaint shall be deemed, for statutory limitations purposes, to relate back to the date of the original complaint.

(f) The Commission may, in its discretion, order the defendant either to post a bond for, or deposit into an interest bearing escrow account, a sum equal to the amount of damages which the Commission finds, upon preliminary investigation, is likely to be ordered after the issue of damages is fully litigated, or some lesser sum which may be appropriate, provided the Commission finds that the grant of this relief is favored on balance upon consideration of the following factors:

(1) The complainant's potential irreparable injury in the absence of such deposit;

(2) The extent to which damages can be accurately calculated;

(3) The balance of the hardships between the complainant and the defendant; and

(4) Whether public interest considerations favor the posting of the bond or ordering of the deposit.

(g) The Commission may, in its discretion, end adjudication of damages by adopting a damages computation method or formula. In such cases, the parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission-mandated method or formula. Within 30 days of the release date of the damages order, parties shall submit jointly to the Commission either:

(1) A statement detailing the parties' agreement as to the amount of damages;

(2) A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or

(3) A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.

(h) In any proceeding to which no statutory deadline applies, the Commission may, in its discretion, suspend ongoing damages proceedings to provide the parties with time to pursue settlement negotiations or mediation under § 1.737.

**§ 1.724 Complaints governed by section 208(b)(1) of the Act.**

(a) Any party that intends to file a complaint subject to the 5-month deadline in 47 U.S.C. 208(b)(1) must comply with the pre-complaint procedures below. The Enforcement Bureau's Market Disputes Resolution Division will not process complaints subject to the 5-month deadline unless the filer complies with these procedures.

(b) A party seeking to file a complaint subject to 47 U.S.C. 208(b)(1) shall notify the Chief of the Market Disputes Resolution Division in writing of its intent to file the complaint, and provide a copy of the letter to the defendant. Commission staff will convene a conference with both parties as soon as practicable. During that conference, the staff may discuss, among other things:

(1) Scheduling in the case;

(2) Narrowing factual and legal issues in dispute;

(3) Information exchange and discovery necessary to adjudicate the dispute;

(4) Entry of a protective order governing confidential material; and

(5) Preparation for and scheduling a mandatory settlement negotiation session at the Commission.

(c) Staff will endeavor to complete the pre-complaint process as expeditiously as possible. Staff may direct the parties to exchange relevant information during the pre-complaint period.

**§ 1.725 Joinder of complainants and causes of action.**

(a) Two or more complainants may join in one complaint if their respective causes of action are against the same defendant and concern substantially the same facts and alleged violation of the Communications Act or Commission regulation or order.

(b) Two or more grounds of complaint involving substantially the same facts may be included in one complaint, but should be separately stated and numbered.

**§ 1.726 Answers.**

(a) Any defendant upon which a copy of a formal complaint is served shall answer such complaint in the manner prescribed under this section within 30 calendar days of service of the formal complaint by the complainant, unless otherwise directed by the Commission.

(b) The answer shall advise the complainant and the Commission fully and completely of the nature of any defense, and shall respond specifically to all material allegations of the complaint. Every effort shall be made to narrow the issues in the answer. The defendant shall state concisely its defense to each claim asserted, admit or deny the averments on which the complainant relies, and state in detail the basis for admitting or denying such averment. General denials are prohibited. Denials based on information and belief are prohibited unless made in good faith and accompanied by a declaration or affidavit explaining the basis for the defendant's belief and why the defendant could not reasonably ascertain the facts from the complainant or any other source. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part of an averment, the defendant shall specify so much of it as is true and shall deny only the remainder. The defendant may deny the allegations of the complaint as specific denials of either designated averments or paragraphs.

(c) The answer shall include legal analysis relevant to the claims and arguments set forth therein.

(d) Averments in a complaint or supplemental complaint filed pursuant

to § 1.723(d) are deemed to be admitted when not denied in the answer.

(e) Affirmative defenses to allegations in the complaint shall be specifically captioned as such and presented separately from any denials made in accordance with paragraph (b) of this section.

(f) The answer shall include an information designation containing:

(1) The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding, along with the subjects of that information, excluding individuals otherwise identified in the complaint, answer, or exhibits thereto, and individuals employed by another party; and

(2) A copy—or a description by category and location—of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control, excluding documents submitted with the complaint or answer.

(g) Failure to file an answer may be deemed an admission of the material facts alleged in the complaint. Any defendant that fails to file and serve an answer within the time and in the manner prescribed by this part may be deemed in default and an order may be entered against such defendant in accordance with the allegations contained in the complaint.

**§ 1.727 Cross-complaints and counterclaims.**

Cross-complaints seeking any relief within the jurisdiction of the Commission against any party (complainant or defendant) to that proceeding are prohibited. Any claim that might otherwise meet the requirements of a cross-complaint may be filed as a separate complaint in accordance with §§ 1.720 through 1.740. For purposes of this subpart, the term "cross-complaint" shall include counterclaims.

**§ 1.728 Replies.**

(a) A complainant shall file and serve a reply within 10 calendar days of service of the answer, unless otherwise directed by the Commission. The reply shall contain statements of relevant, material facts and legal arguments that respond to the factual allegations and legal arguments made by the defendant. Other allegations or arguments will not be considered by the Commission.

(b) Failure to reply will not be deemed an admission of any allegations contained in the responsive pleading, except with respect to any affirmative defense set forth therein. Failure to

reply to an affirmative defense shall be deemed an admission of such affirmative defense and of any facts supporting such affirmative defense that are not specifically contradicted in the complaint.

(c) The reply shall include legal analysis relevant to the claims and arguments set forth therein.

(d) The reply shall include an information designation containing:

(1) The name and, if known, the address and telephone number of each individual likely to have information relevant to the proceeding and addressed in the reply, along with the subjects of that information, excluding individuals otherwise identified in the complaint, answer, reply, or exhibits thereto, and individuals employed by another party; and

(2) A copy—or a description by category and location—of all relevant documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control that are addressed in the reply, excluding documents submitted with the complaint or answer.

#### § 1.729 Motions.

(a) A request for a Commission order shall be by written motion, stating with particularity the grounds and authority therefor, including any supporting legal analysis, and setting forth the relief sought.

(b) Motions to compel discovery must contain a certification by the moving party that a good faith attempt to resolve the dispute was made prior to filing the motion.

(c) Motions seeking an order that the allegations in the complaint be made more definite and certain are prohibited.

(d) Motions to dismiss all or part of a complaint are permitted. The filing of a motion to dismiss does not suspend any other filing deadlines under the Commission's rules, unless staff issues an order suspending such deadlines.

(e) Oppositions to motions shall be filed and served within 5 business days after the motion is served. Oppositions shall be limited to the specific issues and allegations contained in the motion; when a motion is incorporated in an answer to a complaint, the opposition to such motion shall not address any issues presented in the answer that are not also specifically raised in the motion. Failure to oppose any motion may constitute grounds for granting the motion.

(f) No reply may be filed to an opposition to a motion, except under direction of Commission staff.

#### § 1.730 Discovery.

(a) A complainant may file with the Commission and serve on a defendant, concurrently with its complaint, up to 10 written interrogatories. A defendant may file with the Commission and serve on a complainant, concurrently with its answer, up to 10 written interrogatories. A complainant may file with the Commission and serve on a defendant, concurrently with its reply, up to five additional written interrogatories. Subparts of any interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. Interrogatories filed and served pursuant to this procedure may be used to seek discovery of any non-privileged matter that is relevant to the material facts in dispute in the pending proceeding. This procedure may not be employed for the purpose of delay, harassment, or obtaining information that is beyond the scope of permissible inquiry related to the material facts in dispute in the proceeding.

(b) Interrogatories filed and served pursuant to paragraph (a) of this section shall contain an explanation of why the information sought in each interrogatory is both necessary to the resolution of the dispute and not available from any other source.

(c) Unless otherwise directed by the Commission, within seven calendar days, a responding party shall file with the Commission and serve on the propounding party any opposition and objections to interrogatories. The grounds for objecting to an interrogatory must be stated with specificity. Unless otherwise directed by the Commission, any interrogatories to which no opposition or objection is raised shall be answered within 20 calendar days.

(d) Commission staff shall rule in writing on the scope of, and schedule for answering, any disputed interrogatories based upon the justification for the interrogatories properly filed and served pursuant to paragraph (a) of this section, and any objections or oppositions thereto, properly filed and served pursuant to paragraph (c) of this section.

(e) Interrogatories shall be answered separately and fully in writing under oath or affirmation by the party served, or if such party is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. The answers shall be signed by the person making them, and the attorney who objects must sign any objections. The answers shall be filed with the Commission and served on the propounding party.

(f) The Commission, in its discretion, may allow additional discovery, including, but not limited to, document production and/or depositions, and it may modify the scope, means and scheduling of discovery in light of the needs of a particular case and the requirements of applicable statutory deadlines.

(g) The Commission may, in its discretion, require parties to provide documents to the Commission in a scanned or other electronic format that:

(1) Indexes the documents by useful identifying information; and

(2) Allows staff to annotate the index so as to make the format an efficient means of reviewing the documents.

(h) A propounding party asserting that a responding party has provided an inadequate or insufficient response to a discovery request may file a motion to compel within ten days of the service of such response, or as otherwise directed by Commission staff, pursuant to the requirements of § 1.729.

#### § 1.731 Confidentiality of information produced or exchanged.

(a) Any information produced in the course of a formal complaint proceeding may be designated as confidential by either party to the proceeding or a third party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(1) through (9), and under § 0.459 of this chapter. Any party asserting confidentiality for such materials must:

(1) Clearly mark each page, or portion thereof, for which a confidential designation is claimed. The party claiming confidentiality should restrict its designations to encompass only the specific information that it asserts is confidential. If a confidential designation is challenged, the party claiming confidentiality shall have the burden of demonstrating, by a preponderance of the evidence, that the materials designated as confidential fall under the standards for nondisclosure enunciated in the FOIA and that the designation is narrowly tailored to encompass only confidential information.

(2) File with the Commission, using the Commission's Electronic Comment Filing System, a public version of the materials that redacts any confidential information and clearly marks each page of the redacted public version with a header stating "Public Version." The redacted document shall be machine-readable whenever technically possible. Where the document to be filed electronically contains metadata that is

confidential or protected from disclosure by a legal privilege (including, for example, the attorney-client privilege), the filer may remove such metadata from the document before filing it electronically.

(3) File with the Secretary's Office an unredacted hard copy version of the materials that contains the confidential information and clearly marks each page of the unredacted confidential version with a header stating "Confidential Version." The unredacted version must be filed on the same day as the redacted version.

(4) Serve one hard copy of the filed unredacted materials and one hard copy of the filed redacted materials on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or email, together with a proof of such service in accordance with the requirements of §§ 1.47(g) and 1.734(f).

(b) An attorney of record for a party or a party that receives unredacted materials marked as confidential may disclose such materials solely to the following persons, only for use in prosecuting or defending a party to the complaint action, and only to the extent necessary to assist in the prosecution or defense of the case:

(1) Support personnel for counsel of record representing the parties in the complaint action;

(2) Officers or employees of the receiving party who are directly involved in the prosecution or defense of the case;

(3) Consultants or expert witnesses retained by the parties; and

(4) Court reporters and stenographers in accordance with the terms and conditions of this section.

(c) The individuals identified in paragraph (b) of this section shall not disclose information designated as confidential to any person who is not authorized under this section to receive such information, and shall not use the information in any activity or function other than the prosecution or defense in the case before the Commission. Each such individual who is provided access to the information shall sign a declaration or affidavit stating that the individual has personally reviewed the Commission's rules and understands the limitations they impose on the signing party.

(d) Parties may make copies of materials marked confidential solely for use by the Commission or persons designated in paragraph (b) of this section. Each party shall maintain a log recording the number of copies made of

all confidential material and the persons to whom the copies have been provided.

(e) The Commission may adopt a protective order with further restrictions as appropriate.

(f) Upon termination of a formal complaint proceeding, including all appeals and petitions, the parties shall ensure that all originals and reproductions of any confidential materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the confidential materials of an opposing or third party shall be destroyed.

#### **§ 1.732 Other required written submissions.**

(a) The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence and presenting relevant legal authority and analysis. The Commission may limit the scope of any briefs to certain subjects or issues. Unless otherwise directed by the Commission, all briefs shall include all legal and factual claims and defenses previously set forth in the complaint, answer, or any other pleading submitted in the proceeding.

(b) Claims and defenses previously made but not reflected in the briefs will be deemed abandoned.

(c) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding.

#### **§ 1.733 Status conference.**

(a) In any complaint proceeding, the Commission may, in its discretion, direct the attorneys and/or the parties to appear before it for a status conference. A status conference may include discussion of:

(1) Simplification or narrowing of the issues;

(2) The necessity for or desirability of additional pleadings or evidentiary submissions;

(3) Obtaining admissions of fact or stipulations between the parties as to any or all of the matters in controversy;

(4) Settlement of all or some of the matters in controversy by agreement of the parties;

(5) Whether discovery is necessary and, if so, the scope, type, and schedule for such discovery;

(6) The schedule for the remainder of the case and the dates for any further status conferences; and

(7) Such other matters that may aid in the disposition of the complaint.

(b)(1) Parties shall meet and confer prior to the initial status conference to discuss:

(i) Settlement prospects;

(ii) Discovery;

(iii) Issues in dispute;

(iv) Schedules for pleadings;

(v) Joint statement of stipulated facts, disputed facts, and key legal issues; and

(2) Parties shall submit a joint statement of all proposals agreed to and disputes remaining as a result of such meeting to Commission staff on a date specified by the Commission.

(c) In addition to the initial status conference referenced in paragraph (a) of this section, any party may also request that a conference be held at any time after the complaint has been filed.

(d) During a status conference, the Commission staff may issue oral rulings pertaining to a variety of matters relevant to the conduct of a formal complaint proceeding including, *inter alia*, procedural matters, discovery, and the submission of briefs or other evidentiary materials.

(e) Status conferences will be scheduled by the Commission staff at such time and place as it may designate to be conducted in person or by telephone conference call.

(f) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver by that party and will not preclude the Commission staff from conferring with those parties or counsel present.

#### **§ 1.734 Fee remittance; electronic filing; copies; service; separate filings against multiple defendants.**

(a) Complaints may not be brought against multiple defendants unless they are commonly owned or controlled, are alleged to have acted in concert, are alleged to be jointly liable to complainant, or the complaint concerns common questions of law or fact. Complaints may, however, be consolidated by the Commission for disposition.

(b) The complainant shall remit separately the correct fee either by check, wire transfer, or electronically, in accordance with part 1, subpart G (see § 1.1106) and, shall file an original copy of the complaint, using the Commission's Electronic Comment Filing System. If a complaint is addressed against multiple defendants, the complainant shall pay a separate fee for each additional defendant.

(c) The complainant shall serve the complaint by hand delivery on either the named defendant or one of the

named defendant's registered agents for service of process on the same date that the complaint is filed with the Commission in accordance with the requirements of paragraph (b) of this section.

(d) Upon receipt of the complaint by the Commission, the Commission shall promptly send, by email, to each defendant named in the complaint, notice of the filing of the complaint. The Commission shall additionally send by email, to all parties, a schedule detailing the date the answer and any other applicable pleading will be due and the date, time, and location of the initial status conference.

(e) Parties shall provide hard copies of all submissions to staff in the Enforcement Bureau upon request.

(f) All subsequent pleadings and briefs filed in any formal complaint proceeding, as well as all letters, documents, or other written submissions, shall be filed using the Commission's Electronic Comment Filing System, excluding confidential material as set forth in § 1.731. In addition, all pleadings and briefs filed in any formal complaint proceeding, as well as all letters, documents, or other written submissions, shall be served by the filing party on the attorney of record for each party to the proceeding, or, where a party is not represented by an attorney, each party to the proceeding either by hand delivery, overnight delivery, or email, together with a proof of such service in accordance with the requirements of § 1.47(g). Service is deemed effective as follows:

(1) Service by hand delivery that is delivered to the office of the recipient by 5:30 p.m., local time of the recipient, on a business day will be deemed served that day. Service by hand delivery that is delivered to the office of the recipient after 5:30 p.m., local time of the recipient, on a business day will be deemed served on the following business day;

(2) Service by overnight delivery will be deemed served the business day following the day it is accepted for overnight delivery by a reputable overnight delivery service; or

(3) Service by email that is fully transmitted to the office of the recipient by 5:30 p.m., local time of the recipient, on a business day will be deemed served that day. Service by email that is fully transmitted to the office of the recipient after 5:30 p.m., local time of the recipient, on a business day will be deemed served on the following business day.

(g) Supplemental complaints filed pursuant to § 1.723 shall conform to the requirements set forth in this section,

except that the complainant need not submit a filing fee.

#### **§ 1.735 Conduct of proceedings.**

(a) The Commission may issue such orders and conduct its proceedings as will best conduce to the proper dispatch of business and the ends of justice.

(b) The Commission may decide each complaint upon the filings and information before it, may request additional information from the parties, and may require one or more informal meetings with the parties to clarify the issues or to consider settlement of the dispute.

#### **§ 1.736 Accelerated Docket Proceedings.**

(a) With the exception of complaint proceedings under 47 U.S.C. 255, 617, and 619, and part 14 of this chapter, parties to a formal complaint proceeding against a common carrier, or a pole attachment complaint proceeding against a cable television system operator, a utility, or a telecommunications carrier, may request inclusion on the Accelerated Docket. Proceedings on the Accelerated Docket must be concluded within 60 days, and are therefore subject to shorter pleading deadlines and other modifications to the procedural rules that govern formal complaint proceedings.

(b) A complainant that seeks inclusion of a proceeding on the Accelerated Docket shall submit a request to the Chief of the Enforcement Bureau's Market Disputes Resolution Division, by phone and in writing, prior to filing the complaint.

(c) Within five days of receiving service of any formal complaint against a common carrier, or a pole attachment complaint against a cable television system operator, a utility, or a telecommunications carrier, a defendant may submit a request seeking inclusion of the proceeding on the Accelerated Docket to the Chief of the Enforcement Bureau's Market Disputes Resolution Division. The defendant shall submit such request by phone and in writing, and contemporaneously transmit a copy of the written request to all parties to the proceeding.

(d) Commission staff has discretion to decide whether a complaint, or portion of a complaint, is suitable for inclusion on the Accelerated Docket.

(e) In appropriate cases, Commission staff may require that the parties participate in pre-filing settlement negotiations or mediation under § 1.737.

(f) If the parties do not resolve their dispute and the matter is accepted for handling on the Accelerated Docket,

staff will establish the schedule and process for the proceeding.

(g) If it appears at any time that a proceeding on the Accelerated Docket is no longer appropriate for such treatment, Commission staff may remove the matter from the Accelerated Docket either on its own motion or at the request of any party.

(h) In Accelerated Docket proceedings, the Commission may conduct a minitrial, or a trial-type hearing, as an alternative to deciding a case on a written record. Minitrials shall take place no later than between 40 and 45 days after the filing of the complaint. A Commission Administrative Law Judge ("ALJ") or staff may preside at the minitrial.

(i) Applications for review of staff decisions issued on delegated authority in Accelerated Docket proceedings shall comply with the filing and service requirements in § 1.115(e)(4). In Accelerated Docket proceedings which raise issues that may not be decided on delegated authority (see 47 U.S.C. 155(c)(1); 47 CFR 0.331(c)), the staff decision will be a recommended decision subject to adoption or modification by the Commission. Any party to the proceeding that seeks modification of the recommended decision shall do so by filing comments challenging the decision within 15 days of its release. Opposition comments, shall be filed within 15 days of the comments challenging the decision; reply comments shall may be filed 10 days thereafter and shall be limited to issues raised in the opposition comments.

(j) If no party files comments challenging the recommended decision, the Commission will issue its decision adopting or modifying the recommended decision within 45 days of its release. If parties to the proceeding file comments to the recommended decision, the Commission will issue its decision adopting or modifying the recommended decision within 30 days of the filing of the final comments.

■ 8. Add §§ 1.737 through 1.740 to read as follows:

#### **§ 1.737 Mediation.**

(a) The Commission encourages parties to attempt to settle or narrow their disputes. To that end, staff in the Enforcement Bureau's Market Disputes Resolution Division are available to conduct mediations. Staff will determine whether a matter is appropriate for mediation. Participation in mediation is generally voluntary, but may be required as a condition for including a matter on the Accelerated Docket.

(b) Parties may request mediation of a dispute before the filing of a complaint. After a complaint has been filed, parties may request mediation as long as a proceeding is pending before the Commission.

(c) Parties may request mediation by: Calling the Chief of the Enforcement Bureau's Market Disputes Resolution Division; submitting a written request in a letter addressed to the Chief of the Market Disputes Resolution Division; or including a mediation request in any pleading in a formal complaint proceeding, or an informal complaint proceeding under § 1.717. Any party requesting mediation must verify that it has attempted to contact all other parties to determine whether they are amenable to mediation, and shall state the response of each party, if any.

(d) Staff will schedule the mediation in consultation with the parties. Staff may request written statements and other information from the parties to assist in the mediation.

(e) In any proceeding to which no statutory deadline applies, staff may, in its discretion, hold a case in abeyance pending mediation.

(f) The parties and Commission staff shall keep confidential all written and oral communications prepared or made for purposes of the mediation, including mediation submissions, offers of compromise, and staff and party comments made during the course of the mediation (Mediation Communications). Neither staff nor the parties may use, disclose or seek to disclose Mediation Communications in any proceeding before the Commission (including an arbitration or a formal complaint proceeding involving the instant dispute) or before any other tribunal, unless compelled to do so by law. Documents and information that are otherwise discoverable do not become Mediation Communications merely because they are disclosed or discussed during the mediation. Unless otherwise directed by Commission staff, the existence of the mediation will not be treated as confidential. A party may request that the existence of the mediation be treated as confidential in a case where this fact has not previously been publicly disclosed, and staff may grant such a request for good cause shown.

(g) Any party or Commission staff may terminate a mediation by notifying other participants of their decision to terminate. Staff shall promptly confirm in writing that the mediation has ended. The confidentiality rules in paragraph (f) of this section shall continue to apply to any Mediation Communications. Further, unless otherwise directed, any

staff ruling requiring that the existence of the mediation be treated as confidential will continue to apply after the mediation has ended.

(h) For disputes arising under 47 U.S.C. 255, 617, and 619, and the advanced communications services and equipment rules, parties shall submit the Request for Dispute Assistance in accordance with § 14.32 of this chapter.

**§ 1.738 Complaints filed pursuant to 47 U.S.C. 271(d)(6)(B).**

(a) Where a complaint is filed pursuant to 47 U.S.C. 271(d)(6)(B), parties shall indicate whether they are willing to waive the 90 day resolution deadline contained in 47 U.S.C. 271(d)(6)(B) in the following manner:

(1) The complainant shall so indicate in both the complaint itself and in the Formal Complaint Intake Form, and the defendant shall so indicate in its answer; or

(2) The parties shall indicate their agreement to waive the 90 day resolution deadline to the Commission staff at the initial status conference, to be held in accordance with § 1.733.

(b) Requests for waiver of the 90 day resolution deadline for complaints filed pursuant to 47 U.S.C. 271(d)(6)(B) will not be entertained by the Commission staff subsequent to the initial status conference, absent a showing by the complainant and defendant that such waiver is in the public interest.

**§ 1.739 Primary jurisdiction referrals.**

(a) Any party to a case involving claims under the Act that has been referred to the Commission by a court pursuant to the primary jurisdiction doctrine must contact the Market Disputes Resolution Division of the Enforcement Bureau for guidance before filing any pleadings or otherwise proceeding before the Commission.

(b) Based upon an assessment of the procedural history and the nature of the issues involved, the Market Disputes Resolution Division will determine the procedural means by which the Commission will handle the primary jurisdiction referral.

(c) Failure to contact the Market Disputes Resolution Division prior to filing any pleadings or otherwise proceeding before the Commission, or failure to abide by the Division's determinations regarding the referral, may result in dismissal.

**§ 1.740 Review period for section 208 formal complaints not governed by section 208(b)(1) of the Act.**

(a) Except in extraordinary circumstances, final action on a formal complaint filed pursuant to section 208 of the Act, and not governed by section

208(b)(1), should be expected no later than 270 days from the date the complaint is filed with the Commission.

(b) The Enforcement Bureau shall have the discretion to pause the 270-day review period in situations where actions outside the Commission's control are responsible for unreasonably delaying Commission review of a complaint referenced in paragraph (a) of this section.

■ 9. Amend the table of contents of part 1 by revising the entries in Subpart J to read as follows:

\* \* \* \* \*

**Subpart J—Pole Attachment Complaint Procedures**

Sec.

1.1401 Purpose.

1.1402 Definitions.

1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

1.1404 Pole attachment complaint proceedings.

1.1405 Dismissal of pole attachment complaints for lack of jurisdiction.

1.1406 Commission consideration of the complaint.

1.1407 Remedies.

1.1408 Imputation of rates; modification costs.

1.1409 Allocation of unusable space costs.

1.1410 Use of presumptions in calculating the space factor.

1.1411 Timeline for access to utility poles.

1.1412 Contractors for survey and make-ready.

1.1413 Complaints by incumbent local exchange carriers.

1.1414 Review period for pole access complaints.

\* \* \* \* \*

■ 10. Revise § 1.1401 to read as follows:

**§ 1.1401 Purpose.**

The rules and regulations contained in subpart J of this part provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms, and conditions that are just and reasonable. They also provide complaint and enforcement procedures for incumbent local exchange carriers (as defined in 47 U.S.C. 251(h)) to ensure that the rates, terms, and conditions of their access to pole attachments are just and reasonable.

■ 11. Amend § 1.1402 by revising paragraph (f) to read as follows:

**§ 1.1402 Definitions.**

\* \* \* \* \*

(f) The term *defendant* means a cable television system operator, a utility, or

a telecommunications carrier against whom a complaint is filed.

\* \* \* \* \*

■ 12. Amend § 1.1403 by revising paragraphs (c)(1) and (d) to read as follows:

**§ 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.**

\* \* \* \* \*

(c) \* \* \*

(1) Removal of facilities or termination of any service to those facilities, such removal or termination arising out of a rate, term or condition of the cable television system operator's or telecommunications carrier's pole attachment agreement;

\* \* \* \* \*

(d) A cable television system operator or telecommunications carrier may file a "Petition for Temporary Stay" of the action contained in a notice received pursuant to paragraph (c) of this section within 15 days of receipt of such notice. Such submission shall not be considered unless it includes, in concise terms, the relief sought, the reasons for such relief, including a showing of irreparable harm and likely cessation of cable television service or telecommunication service, a copy of the notice, and certification of service as required by § 1.1404(b). The named may file an answer within 7 days of the date the Petition for Temporary Stay was filed. No further filings under this section will be considered unless requested or authorized by the Commission and no extensions of time will be granted unless justified pursuant to § 1.46.

\* \* \* \* \*

■ 13. Revise §§ 1.1404 through 1.1405 to read as follows:

**§ 1.1404 Pole attachment complaint proceedings.**

(a) Pole attachment complaint proceedings shall be governed by the formal complaint rules in subpart E of this part, §§ 1.720–1.740, except as otherwise provided in this subpart J.

(b) The complaint shall be accompanied by a certification of service on the named defendant, and each of the Federal, State, and local governmental agencies that regulate any aspect of the services provided by the complainant or defendant.

(c) In a case where it is claimed that a rate, term, or condition is unjust or unreasonable, the complaint shall contain a statement that the State has not certified to the Commission that it regulates the rates, terms and conditions

for pole attachments. The complaint shall include a statement that the utility is not owned by any railroad, any person who is cooperatively organized or any person owned by the Federal Government or any State.

(d) The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable television system operator or telecommunications carrier and the utility. If there is no present pole attachment agreement, the complaint shall contain:

(1) A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and

(2) A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.

(e) The complaint shall state with specificity the pole attachment rate, term or condition which is claimed to be unjust or unreasonable and provide all data and information supporting such claim. Data and information supporting the complaint (including all information necessary for the Commission to apply the rate formulas in § 1.1406 should be based upon historical or original cost methodology, insofar as possible. Data should be derived from ARMIS, FERC 1, or other reports filed with state or federal regulatory agencies (identify source). The complainant shall also specify any other information and argument relied upon to attempt to establish that a rate, term, or condition is not just and reasonable.

(f) A utility must supply a cable television system operator or telecommunications carrier the information required in paragraph (e) of this section, as applicable, along with the supporting pages from its ARMIS, FERC Form 1, or other report to a regulatory body, and calculations made in connection with these figures, within 30 days of the request by the cable television system operator or telecommunications carrier.

(g) If any of the information and data required in paragraphs (e) and (f) of this section is not provided to the cable television system operator or telecommunications carrier by the utility upon reasonable request, the cable television system operator or telecommunications carrier shall include a statement indicating the steps taken to obtain the information from the utility, including the dates of all requests. No complaint filed by a cable television system operator or telecommunications carrier shall be

dismissed where the utility has failed to provide the information required under paragraphs (e) and (f) after such reasonable request.

**§ 1.1405 Dismissal of pole attachment complaints for lack of jurisdiction.**

(a) The complaint shall be dismissed for lack of jurisdiction in any case where a suitable certificate has been filed by a State pursuant to paragraph (b) of this section. Such certificate shall be conclusive proof of lack of jurisdiction of this Commission. A complaint alleging a denial of access shall be dismissed for lack of jurisdiction in any case where the defendant or a State offers proof that the State is regulating such access matters. Such proof should include a citation to state laws and regulations governing access and establishing a procedure for resolving access complaints in a state forum. A complaint against a utility shall also be dismissed if the utility does not use or control poles, ducts, or conduits used or designated, in whole or in part, for wire communication or if the utility does not meet the criteria of § 1.1402(a).

(b) It will be rebuttably presumed that the state is not regulating pole attachments if the Commission does not receive certification from a state that:

(1) It regulates rates, terms and conditions for pole attachments;

(2) In so regulating such rates, terms and conditions, the state has the authority to consider and does consider the interests of the consumers of the services offered via such attachments, as well as the interests of the consumers of the utility services; and

(3) It has issued and made effective rules and regulations implementing the state's regulatory authority over pole attachments (including a specific methodology for such regulation which has been made publicly available in the state).

(c) Upon receipt of such certification, the Commission shall give public notice. In addition, the Commission shall compile and publish from time to time, a listing of states which have provided certification.

(d) Upon receipt of such certification, the Commission shall forward any pending case thereby affected to the state regulatory authority, shall so notify the parties involved and shall give public notice thereof.

(e) Certification shall be by order of the state regulatory body or by a person having lawful delegated authority under provisions of state law to submit such certification. Said person shall provide in writing a statement that he or she has such authority and shall cite the law,

regulation or other instrument conferring such authority.

(f) Notwithstanding any such certification, jurisdiction will revert to this Commission with respect to any individual matter, unless the state takes final action on a complaint regarding such matter:

(1) Within 180 days after the complaint is filed with the state, or

(2) Within the applicable periods prescribed for such final action in such rules and regulations of the state, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

**§§ 1.1406, 1.1407 and 1.1408 [Removed]**

■ 14. Remove §§ 1.1406, 1.1407 and 1.1408.

**§ 1.1409 [Redesignated as § 1.1406]**

■ 15. Redesignate § 1.1409 as § 1.1406, and revise newly designated § 1.1406 to read as follows:

**§ 1.1406 Commission consideration of the complaint.**

(a) The complainant shall have the burden of establishing a *prima facie*

case that the rate, term, or condition is not just and reasonable or that the denial of access violates 47 U.S.C. 224(f). If, however, a utility argues that the proposed rate is lower than its incremental costs, the utility has the burden of establishing that such rate is below the statutory minimum just and reasonable rate. In a case involving a denial of access, the utility shall have the burden of proving that the denial was lawful, once a *prima facie* case is established by the complainant.

(b) The Commission shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-

way. The Commission shall exclude from actual capital costs those reimbursements received by the utility from cable operators and telecommunications carriers for non-recurring costs.

(c) The Commission shall deny the complaint if it determines that the complainant has not established a *prima facie* case, or that the rate, term or condition is just and reasonable, or that the denial of access was lawful.

(d) The Commission will apply the following formulas for determining a maximum just and reasonable rate:

(1) The following formula shall apply to attachments to poles by cable operators providing cable services. This formula shall also apply to attachments to poles by any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) or cable operator providing telecommunications services until February 8, 2001:

$$\text{Maximum Rate} = \text{Space Factor} \times \frac{\text{Net Cost of a Bare Pole}}{\text{Carrying Charge Rate}}$$

Where

$$\text{Space Factor} = \frac{\text{Space Occupied by Attachment}}{\text{Total Usable Space}}$$

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of the rate yielded by paragraphs (d)(2)(i) or (d)(2)(ii) of this section.

(i) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable

formula in paragraph (d)(2)(ii) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Cost}$$

Where Cost

in Service Areas where the number of Attaching Entities is 5 =  $0.66 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$

in Service Areas where the number of Attaching Entities is 4 =  $0.56 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$

in Service Areas where the number of Attaching Entities is 3 =  $0.44 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$

in Service Areas where the number of Attaching Entities is 2 =  $0.31 \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$

in Service Areas where the number of Attaching Entities is not a whole number =  $N \times (\text{Net Cost of a Bare Pole} \times \text{Carrying Charge Rate})$ , where N is interpolated from the cost allocator associated with the nearest whole numbers above and below the number of Attaching Entities.

$$\text{Where Space Factor} = \frac{\left( \frac{\text{Space Occupied}}{\text{Pole Height}} \right) + \left( \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}}$$

(ii) The following formula applies to the extent that it yields a rate higher than that yielded by the applicable

formula in paragraph (d)(2)(i) of this section:

$$\text{Rate} = \text{Space Factor} \times \text{Net Cost of a Bare Pole} \times \left[ \frac{\text{Maintenance and Administrative}}{\text{Carrying Charge Rate}} \right]$$

$$\text{Where Space Factor} = \left[ \frac{\left( \frac{\text{Space Occupied}}{\text{Pole Height}} \right) + \left( \frac{2}{3} \times \frac{\text{Unusable Space}}{\text{No. of Attaching Entities}} \right)}{\text{Pole Height}} \right]$$

(3) The following formula shall apply to attachments to conduit by cable operators and telecommunications carriers:

$$\text{Maximum Rate per Linear ft./m.} = \left[ \frac{1}{\text{Number of Ducts}} \times \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \right] \times \left[ \frac{\text{No. of Ducts}}{\text{System Duct Length (ft./m.)}} \times \frac{\text{Net Conduit Investment}}{\text{Carrying Charge Rate}} \right]$$

(Percentage of Conduit Capacity)                      (Net Linear Cost of a Conduit)

simplified as:

$$\text{Maximum Rate Per Linear ft./m.} = \frac{1 \text{ Duct}}{\text{No. of Inner Ducts}} \times \frac{\text{Net Conduit Investment}}{\text{System Duct Length (ft./m.)}} \times \text{Carrying Charge Rate}$$

(4) If no inner-duct is installed the fraction, "1 Duct divided by the No. of Inner-Ducts" is presumed to be 1/2.

**§ 1.1410 [Redesignated as § 1.1407]**

■ 16. Redesignate § 1.1410 as § 1.1407, and revise newly designated § 1.1407 to read as follows:

**§ 1.1407 Remedies.**

(a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(1) Terminate the unjust and/or unreasonable rate, term, or condition;

(2) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission; and/or

(3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations.

(b) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or delayed, it may order that access be permitted within a specified time frame

and in accordance with specified rates, terms, and conditions.

**§§ 1.1411 through 1.1415 [Removed]**

■ 17. Remove §§ 1.1411 through 1.1415.

**§ 1.1416 [Redesignated as § 1.1408]**

■ 18. Redesignate § 1.1416 as § 1.1408.

**§ 1.1417 [Redesignated as § 1.1409]**

■ 19. Redesignate § 1.1417 as § 1.1409, and amend newly designated § 1.1409 by revising paragraph (a) and (c) to read as follows:

**§ 1.1409 Allocation of Unusable Space Costs.**

(a) With respect to the formula referenced in § 1.1406(d)(2), a utility shall apportion the cost of providing unusable space on a pole so that such apportionment equals two-thirds of the costs of providing unusable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(c) Utilities may use the following rebuttable presumptive averages when calculating the number of attaching entities with respect to the formula referenced in § 1.1406(d)(2). For non-urbanized service areas (under 50,000 population), a presumptive average number of attaching entities of three. For urbanized service areas (50,000 or higher population), a presumptive

average number of attaching entities of five. If any part of the utility's service area within the state has a designation of urbanized (50,000 or higher population) by the Bureau of Census, United States Department of Commerce, then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities.

\* \* \* \* \*

**§ 1.1418 [Redesignated as § 1.1410]**

■ 20. Redesignate § 1.1418 as § 1.1410, and revise newly designated § 1.1410 to read as follows:

**§ 1.1410 Use of presumptions in calculating the space factor.**

With respect to the formulas referenced in § 1.1406(d)(1) and (d)(2), the space occupied by an attachment is presumed to be one foot. The amount of usable space is presumed to be 13.5 feet. The amount of unusable space is presumed to be 24 feet. The pole height is presumed to be 37.5 feet. These presumptions may be rebutted by either party.

**§ 1.1420 [Redesignated as § 1.1411]**

■ 21. Redesignate § 1.1420 as § 1.1411, and revise paragraph (d) and the introductory text of paragraph (i) to read as follows:

**§ 1.1411 Timeline for access to utility poles.**

\* \* \* \* \*

(d) *Estimate.* Where a request for access is not denied, a utility shall present to a cable operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 14 days of providing the response required by paragraph (c) of this section, or in the case where a prospective attachers' contractor has performed a survey, within 14 days of receipt by the utility of such survey.

(1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 14 days after the estimate is presented.

(2) A cable operator or telecommunications carrier may accept a valid estimate and make payment any time after receipt of an estimate but before the estimate is withdrawn.

\* \* \* \* \*

(i) If a utility fails to respond as specified in paragraph (c) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may, as specified in § 1.1412, hire a contractor to complete a survey. If make-ready is not complete by the date specified in paragraph (e)(1)(ii) of this section, a cable operator or telecommunications carrier requesting attachment in the communications space may hire a contractor to complete the make-ready:

\* \* \* \* \*

**§ 1.1422 [Redesignated as 1.1412]**

■ 22. Redesignate § 1.1422 as § 1.1412, and amend newly designated § 1.1412 by revising paragraphs (a) and (b) to read as follows:

**§ 1.1412 Contractors for survey and make-ready.**

(a) A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles in cases where the utility has failed to meet deadlines specified in § 1.1411.

(b) If a cable operator or telecommunications carrier hires a contractor for purposes specified in § 1.1411, it shall choose from among a utility's list of authorized contractors.

\* \* \* \* \*

**§§ 1.1424 [Redesignated as § 1.1413]**

■ 23. Redesignate § 1.1424 as § 1.1413.

**§ 1.1425 [Redesignated as § 1.1414]**

■ 24. Redesignate § 1.1425 as § 1.1414, and revise newly designated § 1.1414 to read as follows:

**§ 1.1414 Review period for pole attachment complaints.**

(a) *Pole access complaints.* Except in extraordinary circumstances, final action on a complaint where a cable television system operator or provider of telecommunications service claims that it has been denied access to a pole, duct, conduit, or right-of-way owned or controlled by a utility should be expected no later than 180 days from the date the complaint is filed with the Commission. The Enforcement Bureau shall have the discretion to pause the 180-day review period in situations where actions outside the Enforcement Bureau's control are responsible for delaying review of a pole access complaint.

(b) *Other pole attachment complaints.* All other pole attachment complaints shall be governed by the review period in § 1.740.

**PART 6—ACCESS TO TELECOMMUNICATIONS SERVICE, TELECOMMUNICATIONS EQUIPMENT AND CUSTOMER PREMISES EQUIPMENT BY PERSONS WITH DISABILITIES**

■ 25. The authority citation for part 6 continues to read as follows:

**Authority:** 47 U.S.C. 151–154, 208, 255, and 303(r).

■ 26. Revise § 6.15 to read as follows:

**§ 6.15 Generally.**

(a) All manufacturers of telecommunications equipment or customer premises equipment and all providers of telecommunications services, as defined under this subpart are subject to the enforcement provisions specified in the Act and the rules in this chapter.

(b) For purposes of §§ 6.15–6.16, the term “manufacturers” shall denote manufacturers of telecommunications equipment or customer premises equipment and the term “providers” shall denote providers of telecommunications services.

■ 27. Revise § 6.16 to read as follows:

**§ 6.16 Informal or formal complaints.**

Any person may file either a formal or informal complaint against a manufacturer or provider alleging violations of section 255 of the Act or this part subject to the enforcement requirements set forth in §§ 14.30 through 14.38 of this chapter.

**§§ 6.17 through 6.23 [Removed]**

■ 28. Remove §§ 6.17 through 6.23.

**PART 7—ACCESS TO VOICEMAIL AND INTERACTIVE MENU SERVICES AND EQUIPMENT BY PEOPLE WITH DISABILITIES**

■ 29. The authority citation for part 7 continues to read as follows:

**Authority:** 47 U.S.C. 151–154, 208, 255, and 303(r).

■ 30. Revise § 7.15 to read as follows:

**§ 7.15 Generally.**

(a) For purposes of §§ 7.15 through 7.16, the term “manufacturers” shall denote any manufacturer of telecommunications equipment or customer premises equipment which performs a voicemail or interactive menu function.

(b) All manufacturers of telecommunications equipment or customer premises equipment and all providers of voicemail and interactive menu services, as defined under this subpart, are subject to the enforcement provisions specified in the Act and the rules in this chapter.

(c) The term “provider” shall denote any provider of voicemail or interactive menu service.

■ 31. Revise § 7.16 to read as follows:

**§ 7.16 Informal or formal complaints.**

Any person may file either a formal or informal complaint against a manufacturer or provider alleging violations of section 255 or this part subject to the enforcement requirements set forth in §§ 14.30 through 14.38 of this chapter.

**§§ 7.17 through 7.23 [Removed]**

■ 32. Remove §§ 7.17 through 7.23.

\* \* \* \* \*

**PART 14—ACCESS TO ADVANCED COMMUNICATIONS SERVICES AND EQUIPMENT BY PEOPLE WITH DISABILITIES**

■ 33. The authority citation for part 14 continues to read as follows:

**Authority:** 47 U.S.C. 151–154, 255, 303, 403, 503, 617, 618, 619 unless otherwise noted.

■ 34. Amend § 14.38 by revising the section heading and the introductory text to read as follows:

**§ 14.38 Formal complaints.**

Formal complaint proceedings alleging a violation of 47 U.S.C. 255, 617, or 619, or parts 6, 7, or 14 of this chapter, shall be governed by the formal

complaint rules in subpart E of part 1, §§ 1.7201-740.

\* \* \* \* \*

§§ 14.39 through 14.52 [Removed]

■ 35. Remove §§ 14.39 through 14.52.

PART 20—COMMERCIAL MOBILE SERVICES

■ 36. The authority citation to part 20 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a) 154(i), 157, 160, 201, 214, 222, 251(e), 301, 302, 303, 303(b), 303(r), 307, 307(a), 309, 309(j)(3), 316, 316(a), 332, 610, 615, 615a, 615b, 615c, unless otherwise noted.

■ 37. Amend § 20.18 by revising paragraph (m)(4)(vii) to read as follows:

§ 20.18 911 Service.

\* \* \* \* \*

(m) \* \* \*

(4) \* \* \*

(vii) A copy of the certification must be served on the PSAP in accordance with § 1.47 of this chapter. The PSAP may challenge in writing the accuracy of the carrier's certification and shall serve a copy of such challenge on the carrier. See §§ 1.45 and 1.47 and §§ 1.720 through 1.740 of this chapter.

\* \* \* \* \*

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 38. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 201, 202, 218, 222, 225, 226, 227, 228, 251(e), 254(k), 403(b)(2)(B), (c), 616, 620, 1401-1473, unless otherwise noted.

■ 39. Amend § 64.1160 by revising paragraph (e) to read as follows:

§ 64.1160 Absolution procedures where the subscriber has not paid charges.

\* \* \* \* \*

(e) The Federal Communications Commission will not adjudicate a complaint filed pursuant to §§ 1.719 or §§ 1.720-1.740 of this chapter, involving an alleged unauthorized change, as defined by § 64.1100(e), while a complaint based on the same set of facts is pending with a state commission.

\* \* \* \* \*

■ 40. Amend § 64.6217 by revising paragraph (c) to read as follows:

§ 64.6217 Complaints.

\* \* \* \* \*

(c) Formal complaints. Formal complaints against an NDBEDP certified program may be filed in the form and in the manner prescribed under §§ 1.720 through 1.740 of this chapter. Commission staff may grant waivers of, or exceptions to, particular requirements under §§ 1.720 through 1.740 of this chapter for good cause shown; provided, however, that such waiver authority may not be exercised in a manner that relieves, or has the effect of relieving, a complainant of the obligation under §§ 1.721 and 1.722 of this chapter to allege facts which, if true, are sufficient to constitute a

violation or violations of section 719 of the Communications Act or this subpart.

\* \* \* \* \*

PART 68—CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK

■ 41. The authority citation for part 68 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 610.

■ 42. Amend § 68.105 by revising paragraph (d)(3) to read as follows:

§ 68.105 Minimum point of entry (MPOE) and demarcation point.

\* \* \* \* \*

(d) \* \* \*

(3) In any multiunit premises where the demarcation point is not already at the MPOE, the provider of wireline telecommunications services must comply with a request from the premises owner to relocate the demarcation point to the MPOE. The provider of wireline telecommunications services must negotiate terms in good faith and complete the negotiations within forty-five days from said request. Premises owners may file complaints with the Commission for resolution of allegations of bad faith bargaining by provider of wireline telecommunications services. See 47 U.S.C. 208, 47 CFR 1.720 through 1.740.

\* \* \* \* \*